No. 20,188

United States Court of Appeals

For the Ninth Circuit

VEIGH CUMMINGS,

Appellant,

vs.

LARRY R. BULLOCK and ARELETA BULLOCK, his wife,

Appellees.

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTIONAL FACTS

Jurisdiction of the District Court of the United States for the Northern District of California, Northern Division, is based upon diversity of citizenship, appellees being citizens of the State of California and appellant being a citizen of the State of Utah, and the amount of controversy exceeding $10,000.00 excluding costs and interest.

STATEMENT OF CASE

This appeal is from a judgment that appellant take nothing by reason of his Complaint entered on the 12th day of March, 1965, by the Honorable Sherrill

Halbert, Judge of the United States District Court for the Northern District of California, Northern Division.

Appellant and appellees were parties to an agreement entitled "Lease with Option to Purchase", dated September 2, 1958. The lease covered land and personal property located in the State of Wyoming. The lease was for a period of two years from December 1, 1958, to December 1, 1960, the option to be exercised on or before December 1, 1960.

A part of the "Lease with Option to Purchase" was a "Uniform Real Estate Contract" which embodied the terms of the purchase agreement. The price of the land was $40,000.00, a $4,000.00 down payment and the balance at $4,000.00 per year. The payment of the down payment, exercised the option. (See paragraphs 4 and 5 of lease and paragraph 3 of "Uniform Real Estate Contract" attached to the lease.)

The "Lease with Option to Purchase" provided that if the appellant exercised the Option to Purchase, the appellees agreed to sign an agreement of sale in accordance with the "Uniform Real Estate Contract."

The down payment and all other payments due on the "Uniform Real Estate Contract" were to be paid to the First National Bank of Evanston, Wyoming. The "Uniform Real Estate Contract" also provided that the appellees would place in escrow with the First National Bank of Evanston, Wyoming, the Warranty Deed to the premises to be delivered to the buyer on payment in full by the buyer to the Bank of the payments required by the "Uniform Real Estate Contract".

There is no dispute between the parties concerning the language of the documents which govern their transaction. The dispute arises as to the legal significance of the language.

The $4,000.00 payment was received by the First National Bank of Evanston, Wyoming, on the 30th day of November, 1960. A letter with the payment contained a Warranty Deed and the "Uniform Real Estate Contract" to be executed by appellees, with instructions to the Bank that upon execution of the "Uniform Real Estate Contract" and the Warranty Deed, that the Bank should deliver the $4,000.00 down payment to appellees. A copy of the letter of instructions to the Bank with copies of the "Uniform Real Estate Contract" and Warranty Deed were forwarded to the appellees in California, and were received by them on or about the 2nd of December, 1960, in California.

Appellee, Larry R. Bullock contacted the First National Bank of Evanston, Wyoming, on the 5th of December, 1960, and refused to execute the Warranty Deed and "Uniform Real Estate Contract" before receiving the $4,000.00 down payment which the Bank had.

The Court found that the agreements which are quoted require, as a condition precedent, the unconditional payment by appellant to appellees of the $4,000.00. That the requirement that they execute the Warranty Deed and the "Uniform Real Estate Contract" constituted a conditional acceptance of the options which appellees could reject.

STATEMENT OF POINTS

Point 1

The District Court erred in its interpretation of the "Lease with Option to Purchase" and "Uniform Real Estate Contract" in determining that the $4,000.00 down payment was to be paid without requiring appellees to execute the "Uniform Real Estate Contract" and Warranty Deed.

Point 2

The District Court erred in concluding that the options granted appellant in the "Lease with Option to Purchase" and "Uniform Real Estate Contract," was not properly exercised by appellant.

ARGUMENT

POINT 1

APPELLANT EXERCISED THE OPTION EXACTLY AS AGREED BY ALL PARTIES.

The trial Court is in error in its interpretation of the "Lease with Option to Purchase" and the "Uniform Real Estate Contract". These documents provide an obligation on the part of appellees to sign the "Uniform Real Estate Contract" and the Warranty Deed upon receipt of the down payment.

Where contracts require down payments, the execution of the contract and the down payment are, in normal business practice, concurrent acts by the parties. The down payment and the promises contained in the contract are the consideration for a vendor obligating himself to sell the premises for the price mentioned in the "Uniform Real Estate Contract".

The documents involved show clearly an installment sale covering real estate. The bank selected in Evanston, Wyoming, was the vendors' bank and it was their agent to whom these payments were to be made. The appellant would receive the Warranty Deed when full payment had been made. Prior to the payment in full, the "Uniform Real Estate Contract" would govern the rights of the parties.

The Statute of Frauds requires that there be a written document to create an enforceable agreement where the sale of land is contemplated. This is the function which the "Uniform Real Estate Contract" in the present controversy was to perform. Wyoming, Utah and California all have such statutes.

The law of Wyoming where the land is located and where the option was to be exercised, would, it is conceded, govern.

A modern Wyoming case setting forth the general law for the exercise of options is *Covey v. Covey's Little America, Inc.* ..... Wyo. ....., 378 P.2d 506. The rules for consideration of options are stated in the following quoted portions of the *Covey* case.

> "An option is a continuing offer to sell and, even though it is conditioned for exercise within a limited time, the option is nevertheless an executory, unilateral contract. Braten v. Baker, 78 Wyo. 273, 323 P. 2d 929, 931, 325 P. 2d 880; Baker v. Coleman, 160 Fla. 297, 34 So. 2d 538, 539. . . ."
>
> "However options are to be strictly construed and where the option is to be exercised within a stated time and in a particular manner, that must be done exactly as prescribed unless, perhaps, there is some intervening circumstance which the

law recognizes as one of the impossibilities which make failure of compliance an exception to the rule. Callisch v. Farnham, 83 Cal.App.2d 427, 188 P.2d 775, 777; Baker v. Coleman, supra. . . ."

"It has been said there are two steps or elements to the exercise of an option: (1) The decision or election to exercise; and (2) the communication of that decision and election within the period limited. See Milner v. Dudrey, 77 Nev. 256, 362 P.2d 439, 443-444. . . ."

The *Covey* case, supra, is distinguishable on the facts from the case before the Court; the Wyoming Court has set down the rule governing the interpretation of contracts, such as before this Court. It also held:

"Along the same line the court, in Gibbons v. Metropolitan Life Ins. Co., 62 Ohio App. 280, 23 N.E.2d 662, affirmed 135 Ohio St. 481, 21 N.E.2d 588, held it was necessary to consider all parts of a contract in order to determine the meaning of any particular part as well as the whole contract. 17 C.J.S. Contracts § 297, pp. 710-711, states that individual clauses must be considered in connection with the rest of the agreement and all parts of the writing and every word in it will, if possible, be given effect, citing authorities thereunder as well as in 17 C.J.S. 1962 Supplement, among which are cases from United States courts and those of 31 states. In the same volume at page 713, it is also noted that a construction neutralizing or nullifying one provision should not be adopted if a contract can be construed so as to give effect to all of its provisions; that a construction rendering a provision meaningless

should be avoided; and that it should be assumed particular clauses are in contract for a purpose."

The documents to be interpreted are entitled, "Lease with Option to Purchase" and "Uniform Real Estate Contract," and seem to be clear in their meaning. The language of the "Lease with Option to Purchase" reads as follows:

"4. Lessee is granted an Option to Purchase the aforesaid described premises for the sum of $40,000.00, said option to be exercised on or before the 1st day of December, 1960 by payment to Lessors of the sum of $4,000.00 which said $4,000.00 shall be applied on the purchase price of $40,000.00.

5. If Lessee shall exercise his Option to Purchase the leased premises, then and in that event Lessors agree to sign an agreement of sale in accordance with the Uniform Real Estate Contract attached to this Lease and Option, which said Uniform Real Estate Contract shall embody the terms of sale which shall govern between lessors and lessees if and when lessee exercises his option to purchase." (See Record page 7.)

The language of the "Uniform Real Estate Contract" attached to the "Lease with Option to Purchase" which is applicable, reads as follows:

"2. Witnesseth: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Uinta, State of Wyoming, to-wit: Whipple Ranch. More particularly described as

follows: See attached Exhibit 'A' particularly describing premises.

Sellers and Buyer agree that sellers will execute a Warranty Deed to the Whipple Ranch premises covering said real property and the personal property leased by sellers to buyer under the terms of that certain lease and option agreement dated September 2, 1958. The Warranty Deed to the real property shall be placed in escrow with the First National Bank of Evanston, Wyoming, to be delivered by said bank to buyer upon receipt in full by the Bank of the payments required under this contract. Bill of Sale to personal property to be delivered upon receipt of payment due December 1, 1960.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Forty Thousand and no/100 * * * Dollars ($40,000.00) payable at the First National Bank, Evanston, Wyoming strictly within the following times, to-wit: Four Thousand and no/100 * * * Dollars ($4,000.00) cash, the receipt of which is hereby acknowledged, and the balance of $36,000.00 shall be paid as follows: $4,000.00 on the 1st day of December, 1961, and a like sum on the 1st day of December each year thereafter until the balance owing is paid in full. Possession of said premises shall be delivered to buyer on the 1st day of December, 1960." (See Record page 10.)

The trial Court found that the requirement by appellant that the appellees execute the "Uniform Real Estate Contract" and the Warranty Deed at the Evanston First National Bank defeated his exercise of the option and made his tender conditional.

This holding is clearly contrary to the general rule governing the exercise of options.

A case from the United States Court of Appeals for the Tenth Circuit, exactly in point, holds in appellant's favor. In *Merrion et al. v. Scorup-Somerville Cattle Co. et al.,* 134 F.2d 473 (Cert. denied 319 U.S. 760, 63 S.Ct. 1317, 87 L.Ed. 1712) the Court held (p. 477):

> "Defendants contend that the acceptance of the contract was conditional and therefore amounted to a rejection of the offer. The material part of the letter of acceptance reads as follows: 'We, the undersigned, on this 27th day of August, 1941, hereby notify the Scorup-Somerville Cattle Company and its President, J. A. Scorup, that we hereby exercise Option No. 1, hereinbefore described, and we hereby tender to the Scorup-Somerville Cattle Company payment of the purchase price, as provided in said Option, upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned of all of the assets owned by said company on the date of said option and thereafter, including 1000 acres, more or less, of irrigated land, 17,000 acres, more or less, of pasture land, 10,000 acres, more or less, of range land, approximately 9,000 cattle, approximately 3000 calves, etc.'
>
> "The acceptance itself was unconditional and absolute. The most that can be said is that the tender of payment made at that time was conditional. The tender made was, however, of the full purchase price, not the initial payment of the $74,000 called for in the contract. Certainly when plaintiffs tendered the full purchase price they

> would be entitled to demand proper conveyance of the assets for which they were paying."

An additional holding by United States Circuit Court that the exercise of an option does not become conditional by reason of the option holder demanding a Deed, is *Grey v. Nickey Bros., Inc.,* 271 Fed. 249 (C.C. of A., Fifth Circuit, February 2, 1921). In this case, the language which the appellee used was as follows:

> "Will exercise our option to buy land West Carroll Parish, La. Mail deed with draft to our bank here. Answer."

The problem created by variance in the offer and acceptance on sale of land contracts has been the subject of an annotation at 149 A.L.R. 205. The rule is stated that it is elementary law that in order to form a contract the offer and acceptance must express assent to one and the same thing and that there must be no material variance between them. Numerous cases are cited and discussed which support this general proposition.

Appellant in the case before the Court, exercised the option in exactly the manner which was contemplated by the "Lease with Option to Purchase" and "Uniform Real Estate Contract" and placed the $4,000.00 down payment in the Evanston First National Bank prior to the 1st day of December, 1960, and requested that the performance by the appellees of the obligation required by them under those agreements, that is, the execution of the Warranty Deed and the execution of the "Uniform Real Estate Contract." There was

absolutely no variance in the manner of appellant's exercising the option and the trial Court's decision that the option was not exercised in the manner contemplated is erroneous.

CONCLUSION

It is respectfully submitted that the Court order entry of judgment in favor of the appellant against the appellees requiring specific performance of the "Lease with Option to Purchase" and the "Uniform Real Estate Contract" in accordance with the terms of said documents, and order the trial Court to award to the appellant reasonable attorney's fees as required by the terms and conditions of the aforementioned documents.

Dated, September 23, 1965.

Respectfully submitted,
JOHN R. SALDINE,
DWIGHT L. KING,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DWIGHT L. KING,
Attorney for Appellant.